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Book Review of Theunis Roux's "The Politics of Principle: The First South African Constitutional Court 1995-2005"

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So much for the first sentence of the conclusion, quoted above. The court must build political support. This, moreover must be 'its own political support'.

When Moseneke DCJ in a recent public lecture declared that the court should be 'pro-poor', he was no doubt referring to the web of provisions in the Bill of Rights which promote the protection and advancement of the impoverished. He could not have meant that the court would always hold for the poor, by dint of 'strategies' and 'doctrines'. It has not done so (as several of its decisions reflect), and cannot do so, if its compass is law. Roux has it otherwise. 'Politics' become entire, which of course it must do if the court itself has to build 'its own political support'. 'Principle' is chimerical.

How this so much as touches sides with the principle of legality, the division of powers and the rule of law will leave readers bemused. If they seek to orient themselves in this regard by searching for the author's grasp of *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA* 2000 (2) SA 674 (CC), they will not find it. (The search must be manual, because unaccountably the book lacks a case index).

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The Politics of Principle: The First South African Constitutional Court, 1995–2005. By Theunis Roux. Cambridge University Press. 2013. xii and pp 433. Price R360.00 (soft cover).

Theunis Roux's important book, *The Politics of Principle: The First South African Constitutional Court, 1995–2005*, is a tightly reasoned and wide-ranging assessment of the Constitutional Court's first decade. It sets out to explain what we must mean when we speak of our admiration for the court in these years (the 'Chaskalson Court', as Roux appropriately calls it), and then to trace the elements of the court's decisions that earned that admiration.

To explain what is admired in the court's work is much more difficult than it might seem. We might say that the court rendered good decisions — but good in what sense? Or we might say that the court dealt successfully with the institutional challenges it faced — but what were those challenges, and what did successfully dealing with them entail?

Roux has a lot to say about each of these questions, to which I shall return, but his central thesis is that what makes the court admirable is that it successfully handled both tasks — wise adjudication and effective institutional functioning — at the same time, and despite the seemingly inevitable trade-offs between them (3). His argument, in short, is that the Constitutional Court succeeded in those years in being both principled and politic.

Roux is surely right that we do want and need constitutional courts to be both of these. An impolitic court is, sooner or later, a court that others, more politic and powerful than the judges, will overwhelm. An injudicious court

may still wield authority, but we will not relish its rule, and at some point we will cease to view its decisions as based in law.

He is also surely right that these two objectives are, as they say, in tension. A decision that deftly avoids an unwelcome confrontation with political branches of the state may sustain a court's long term influence — but it may also rest on reasoning that stretches or simply tears the bounds of argument that the legal community asserts. In the second chapter of his book, Roux explores this tension in rich comparative detail, taking into account the experiences of many nations' courts and framing them in a matrix portraying the intensity of the political and legal constraints that any given court may have to confront.

Using this matrix, he marks the position the Constitutional Court occupied during its first decade. He argues, persuasively, that for most of this decade the court was in a particularly uncomfortable position, facing serious constraints both from the political system and from the legal system's demands for adjudication according to law (390).

The political constraints stemmed in good part from the court's lack of a firm hold on South Africans' allegiance: James Gibson's public opinion surveys, cited by Roux (James L Gibson & Gregory A Caldeira 'Defenders of democracy? Legitimacy, popular acceptance, and the South African Constitutional Court' (2003) 65 *Journal of Politics* 1; James L Gibson 'The evolving legitimacy of the South African Constitutional Court' in François du Bois & Antje du Bois-Pedain (eds) *Justice and Reconciliation in Post-Apartheid South Africa* (2008) 229) suggest that the court in these years never attained the level of popular support of its peer courts in many other countries (34–5). This is not necessarily an indication that the Constitutional Court's efforts to win popular legitimacy were in some way deficient; it may simply prove that these things take time. But without an independent hold on South Africans' allegiance, the court was vulnerable to political attack if and when it came. Moreover, as Roux points out, while the ANC initially needed the court's imprimatur to legitimise the new Constitution, once that stage of the transition was complete, the ANC was freer to chart its own course (144).

At the same time, Roux argues, the Constitutional Court was notably constrained by the boundaries of legal argument. Roux maintains that the court needed to establish that it was a legitimate arbiter of South African law — and that it 'therefore had to maintain some version of the law/politics distinction as a necessary condition of its independence' (215). (It is possible to question whether the Constitutional Court really did need to establish its legitimacy in this way, since the polling data suggest that in fact it *didn't* fully persuade the South African public. But it is quite likely that if the court had not sought so determinedly to embody fidelity to law, its public legitimacy would have been even more uncertain than it was.) It seems fair to say that even as the court imposed the new idea of constitutional supremacy onto South African law (207), it still needed to adhere to the broad conventions of careful legal exposition. Moreover, the justices themselves shared this understanding of their responsibilities (220). As lawyers and judges who had

stood against apartheid, they knew that law could be tremendously unjust; at the same time, they had proven that sometimes the disciplined use of law found room for law's ideals to take hold. The mission of the justices of the Chaskalson Court was to embody that legal discipline in a new and transformative legal order. This was not a conservative undertaking, but it was a law-abiding one.

Thus Roux has established two critical points — he has identified the criteria of success for a constitutional court and explained why South Africa's court faced special challenges in meeting those criteria. The next step is to explain how the court threaded the needle.

To this question Roux offers a startling but perceptive answer. He maintains that the court's institutional success in fact depended on the assent and support of the government, and thus of the ANC (37). The ANC could defend the court against popular disagreement with its decisions, and meanwhile the court would naturally have looked to the ANC government as the primary mover of the social transformation the nation so urgently needed. But the ANC, while it was 'the political actor with . . . the most effective means of protecting' the court, also had 'the greatest means to attack' it (125). The ANC is a big church, and the court's position depended on the pre-eminence within the party of what Roux calls its moderate faction. With that faction in control, the political branches would sustain the court's position (and obey its decisions). If that faction lost power or its perspective shifted, however, then the court's position would at once become fragile (160). Therefore the ideal move for the court would have been to develop a principled jurisprudence that did not dislodge, or alienate, this central component of the ANC.

Roux then sets out to demonstrate that the court in fact developed this sort of jurisprudence. To do so he reviews an array of cases decided by the court, on issues from the abolition of the death penalty to the provision of nevirapine to the regulation of floor-crossing in Parliament. His analyses are rigorous and at the same time nuanced: as he acknowledges several times, the evidence he seeks is always circumstantial. Broadly speaking, his case is that the court's many admirable decisions were still founded on reasoning that left the court room to avoid unwise confrontations with the government (see eg 259), while what he sees as its occasional lapses can be attributed directly to the institutional delicacy of the matters before it (363).

Roux's identification of the problem facing the court is persuasive; his argument for the characterisation of the court's response is thoughtful too, but more contestable. He rightly argues that many of the members of the Chaskalson Court were people with political experience and sensitivity (220–31), and it makes sense to conclude, on that basis, that the judges had considerable understanding of their court's institutional fragility. I do not think we can assume, without more biographical evidence, that they were as pessimistic about the court's position as Professor Gibson's polling data might have counselled. It seems entirely reasonable, however, to infer that the judges reached their decisions with this institutional consideration in mind

— indeed, as the first members of the country's Constitutional Court, they surely were obliged to think about how to perform their duties so as to build the rule of law in the new South Africa. But it is one thing to say the judges were aware of the court's institutional position, and quite another to say that their decisions were the result of choices made, perhaps even consciously, for institutional rather than legal reasons.

Roux argues, for instance, that Arthur Chaskalson's judgment in *S v Makwanyane* 1995 (3) SA 391 (CC) prefers to focus on the rejection of the death penalty in international jurisprudence rather than 'a substantive examination of the implications of the Constitution's moral vision for the question at hand' (242). One reason to have done this would have been to avoid locking in demanding constitutional readings that would have led to broad confrontation with the government. But the inference that this *was* the court's reason is necessarily uncertain, for the justices might have been concerned not to avoid confrontation but to avoid unwisdom — the kind of unwisdom that stems from deciding issues prematurely. They might have felt that the unconstitutionality of the death penalty was so apparent that its abolition did not need to rest on any deeper theorising, and that to undertake such theorising would therefore indeed have been premature. They might also have doubted the feasibility of a complete theorising of the meaning of this or other parts of the Constitution — and I admit to being skeptical about the possibility of root-to-branch theoretical structures myself.

Similarly, in his analysis of the famous socio-economic rights cases, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) and *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) ('TAC'), Roux argues that TAC, which imposed an actual order rather than just issuing a declaration of constitutional invalidity as *Grootboom* had, failed to lay out a justification for this new level of judicial intervention. Instead, Roux points out, the court presented the order as constitutionally compelled and as, in fact, a reflection of respect for the government, based on the court's recognition that '[t]he government has always executed and respected orders of this Court (TAC (supra) para 129, cited at 372–3). Meanwhile, as Roux recounts, the Minister of Health had in fact publicly indicated that an order, if it came, would not be obeyed (298). The court's decision to say only what it did surely *was* shaped by a desire not to provoke state resistance. But the diplomacy reflected in what the court did and did not say actually seems reminiscent of *Brown v Board of Education* 347 US 483 (1954), in which the United States Supreme Court struck down racial segregation in schools without ever quite saying what everyone knew, namely that school segregation was an intentional expression of the subordination of African-Americans.

The example of *Brown* (supra) points to a broader question: what exactly does ruling on the basis of principle require? Roux himself reasons with great precision, and it seems fair to say that at least on occasion the Constitutional Court wrote in broader and less analytical ways. Suppose that in some of these instances the court's reasons for writing in this manner did indeed have to do with shaping approaches that would enable it, in the future, to pursue

the development of constitutional law in the face of potential state resistance better than it would otherwise have been able to — and suppose also that the court never put these institutional reasons into consistent, doctrinal form, and in fact appeared to draw on one strand or another, more or less inarticulately, based on its sense of the institutional considerations at work in a given case. The next question would be whether that kind of reasoning is a departure from 'the path of principle'.

I do not mean to defend ad hoc and willful decision-making, but at the same time I would be reluctant to describe judgments of the sort I have posited as unprincipled. Perhaps that is because this kind of conglomeration of doctrinal and institutional concerns is arguably a feature of the work of the United States Supreme Court. Roux maintains that the US Supreme Court is the 'paradigmatic example' of a 'court in a mature constitutional democracy in which the ideal of adjudication according to law has for some historical reason weakened' (110). Elsewhere he describes American 'legal-professional culture [as] relatively tolerant of consequentialist, policy-based reasoning' (102). I would resist the view that 'consequentialist, policy-based reasoning' must be something other than 'adjudication according to law'. Where Roux discerns departures from the 'path of principle,' I would be inclined to find explorations of what might be called the 'current of constitutionalism'. The flow of that current, moreover, would naturally be different in a world in which judges see the executive as a partner in the constitutional project — as Roux insightfully suggests the Chaskalson Court did (261, 273) — than in a world in which judges see themselves as locked in struggle against the politicians of their country.

A crucial strength of Roux's book, however, is that he does not equate deviation from principle with judicial failure. Instead, he recognises, and emphasises, that the court's task is *not* to insure that each judgment of the court must be fully principled in term of the conventions of legal argument — *et ruat caelum*. Instead, he builds his book around the proposition that the court must succeed both legally and institutionally. To him it is a good reason — not a lame excuse — for a departure from strict principle that the departure helps preserve the court's institutional role, a point he makes most tellingly in his discussion of *Grootboom* (supra) and *TAC* (supra) (291–2 and 302–3). Though we differ somewhat in how we demarcate the realms of institutional survival and legal argumentation, I very much agree with his recognition that the tasks of courts fall on both axes and that attending to both sets of concerns is not weakness but strength. Roux's insightful book lays out this point and then explores its implications in the actual decisions of the Constitutional Court, and therefore is a valuable contribution to our understanding both of the achievement of the Chaskalson Court, and of the critical and delicate role South Africa's Constitutional Court, and its counterparts elsewhere, must continue to play.

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